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VIA HAND DELIVERY

December 12, 2002

EX PARTE

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Marlene Dortch
Secretary
Federal Communications Commission
The Portals
TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

Re: Oral *Ex Parte* Presentations
CC Docket No. 01-337;02-33;95-20;98-10

Dear Ms. Dortch:

On December 11, 2002, Dave Baker, Vice President, EarthLink, and the undersigned met with Matthew Brill, Senior Legal Advisor to Commissioner Abemathy, and Jordan Goldstein, Senior Legal Advisor to Commissioner Copps. Specifically, EarthLink discussed that the Commission should deny the SBC forbearance petition of October 3, 2001.

In these meetings, EarthLink reiterated several points that it made in previously filed comments and reply comments in the above-referenced dockets, as well as some of the points explained in the attached bullet-sheet provided at each of the meetings. Further, EarthLink noted that, aside from Section 203 of the Act, the petition failed to define what dominant carrier regulations are under consideration (e.g., one is left to speculate what FCC rule parts are intended), and does not meet the Section 10 standards of forbearance. Tariffing provides several benefits for the protection of consumer choice of ISPs, such as: the transparency of rates, terms and conditions for all to prevent discriminatory conduct; the FCC's review of tariffs prior to effective date; the certainty of tariff terms for enforcement actions. Detariffing with web posting, however, presents uncertainties for ISP access to the ILECs' telecommunications services unless the FCC provides further clarification of the statutory and regulatory obligations. The petition also appears to present two mutually exclusive requests: a nondominance declaration (which would be wholly unwarranted under the record) and forbearance, based on the predicate that dominant carrier regulation applies. Moreover, EarthLink noted that SBC has requested forbearance irrespective of its separate affiliate. Finally, EarthLink noted to Mr. Goldstein that detariffing might destabilize ISPs' multi-year tariff arrangements for DSL service.

Moreover, EarthLink briefly discussed that a finding of nondominance would be wholly inappropriate, unnecessary given that Section 10 forbearance does not require such an analysis, and would tend to prejudice many issues of the appropriate level of regulation for ILEC

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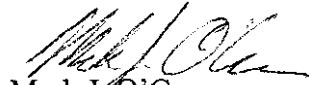
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broadband pending in 01-337 and 02-33 proceedings. EarthLink believes that nondominance is a critical question, which should not be decided at this time in the context of the SBC petition before wireline broadband regulatory issues are resolved.

Pursuant to Section 1.1206(b)(2) of the Commission's Rules, ten copies of this Notice are being provided to you for inclusion in the public record in the above-captioned proceeding. Should you have any questions, please contact the undersigned.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark J. O'Connor", written over a horizontal line.

Mark J. O'Connor
Counsel for EarthLink, Inc.

CC: Matthew Brill
Jordan Goldstein

SBC Advanced Services Forbearance Petition

- Statutory principles prohibiting access on discriminatory terms and requiring public accessibility to telecommunications services should continue to apply to SBC advanced services.
- *SBC Petition* Fails to Meet Section 10 Forbearance Standard
 - Petition fails under “public interest” standard of §§ 10(a)(3) and 10(b). Under Section 10(b), issue is whether forbearance would “enhance competition among providers of telecommunications service” in determining “public interest.” Since FCC’s position is that cable modem service is not a “telecommunications service,” forbearance would not enhance competition among telecom service providers. Thus, while cable market share data is irrelevant to forbearance analysis, *SBC Petition* offered no other evidence to support forbearance.
 - Regulation is “necessary for the protection of consumers,” § 10(a)(2), because (1) consumers obtain enormous value from ISP choice, (2) many consumers have no other open platform to choose unaffiliated ISP, (3) cross-platform switching by consumer is difficult, at best. Dominant carrier regulations keep discriminatory conduct against unaffiliated ISPs in check better than less or no regulation.
- SBC November 15 and 26 *ex parte* letters move in positive direction but raise serious issues requiring clarification:
 - What is enforcement of SBC’s “voluntary commitments”? Likewise, what are remedies for ISPs if “voluntary commitments” are violated?
 - What is SBC’s “voluntary commitment” not to discriminate, in light of fact that Sections 201 and 202 of the Act continue to apply regardless of forbearance action (*see CPE Unbundling Order*, ¶ 46)?
 - Web-posting vs. tariff filings may be acceptable, so long as transparency and nondiscrimination remains.
 - Transparency of rates, terms and conditions and swift FCC enforcement should be made clear.
- FCC should require SBC to maintain multi-year tariff arrangements regardless of detariffing or deregulation. Detariffing should not be used as vehicle to end service, renegotiate arrangements, upset customer expectations and cause consumer dislocation.